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Private Regimes in the Public Sphere: Optimizing the Benefits of Common Interest Communities

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Common interest communities have become more accessible since the founding of Gramercy Park in Manhattan in 1831—the first homeowner association, whose members still enjoy exclusive use of the 2-acre green space they privately maintain. Credit: © AA World Travel Library / Alamy (top), Trust for Architectural Easements (bottom)



PRIVATE REGIMES IN THE PUBLIC SPHERE



OPTIMIZING THE BENEFITS OF
COMMON INTEREST COMMUNITIES

by Gerald Korngold

A *New Yorker* cartoon by Jack Ziegler captures the essential irony of buying into condominiums, cooperatives, and other homeowner associations. A car is entering a driveway that leads to a group of townhouses in the distance, and a sign by the entrance proclaims, “Welcome to Condoville and the Illusion of Owning Your Own Property” (Ziegler 1984).

Despite this ambiguity, about a quarter of the American population now lives in association housing situations, collectively known as common interest communities (CICs). Figure 1 shows the tremendous increase in CICs over the past several decades. From 1970 to 2013, the number of housing units in such communities spiked from about 700,000 to 26.3 million, while the number of residents multiplied more than 30-fold from 2.1 million to 65.7 million.

With their growing popularity, common interest communities have raised policy challenges and legal issues that require ongoing resolution. These conflicts generally reflect either external concerns that CICs segregate the wealthy from the rest of society or internal disagreements between individual owners and their associations’ governing bodies. This article examines some of the controversies associated

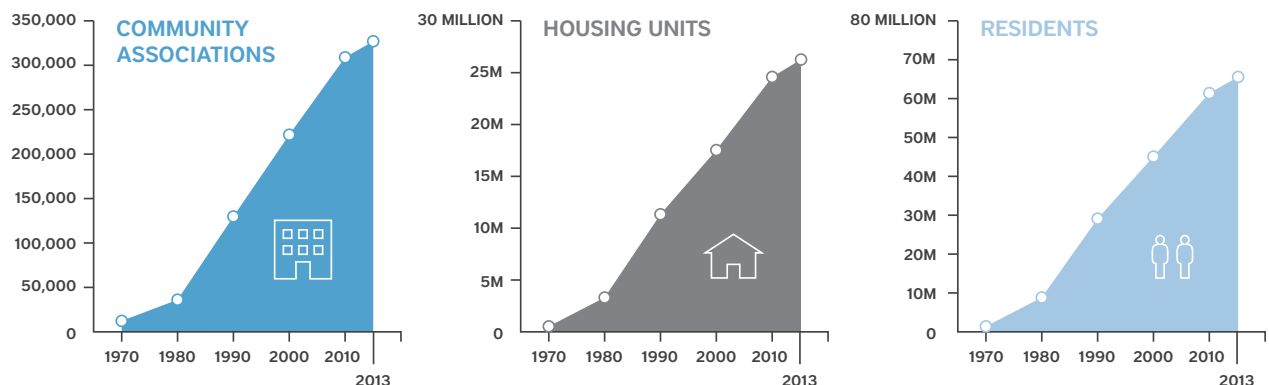
with the CIC model and its governance, and suggests approaches for enhancing the benefits of common interest communities for both property owners and society at large.

The Rise of Common Interest Communities

With increasing industrialization during the 19th century, the intrusion of pollution, traffic, noise, and disease led many planners and citizens to favor the separation of residential, commercial, and industrial uses. (Zoning had not yet emerged as a planning tool and would not be validated by the Supreme Court of the United States until 1926.) Some residential developers thus imposed “servitudes”—covenants, restrictions, and easements—on their subdivision projects. Servitudes generally restricted the properties to residential uses and often created shared rights to communal facilities and services in exchange for fees. Lot purchasers agreed to the servitudes, and once the restrictions were recorded, subsequent purchasers were also legally bound. The common law proved to be an effective vehicle for creating high-end residential areas, including New York City’s Gramercy Park (1831) and Boston’s Louisburg Square (1844).

After a slowdown during the Great Depression

FIGURE 1
GROWTH IN COMMUNITY HOUSING ASSOCIATIONS, HOUSING UNITS, AND RESIDENTS 1970–2013



Source: Foundation for Community Association Research, *Statistical Review 2013*

and World War II, construction of CICs began to boom in the late 1960s, after the Federal Housing Administration (FHA) recognized the condominium as an insurable ownership vehicle, and state statutory authorization followed. FHA mortgage insurance encouraged developers to build middle-class condominiums, which gained market acceptance as a result of the “new town” movement—exemplified by early planned communities such as Reston, Virginia (1964), and Columbia, Maryland (1967). The passage of California’s Proposition 13, the initiative that

and subject to the law of contract rather than public administrative and Constitutional law (see Box 1).

Economic Benefits of CICs

CICs bring substantial economic benefits to owners and to society at large. Residents who buy into these communities have determined that shared facilities, such as recreational areas, are a better value than, say, personal swimming pools and other private facilities. Similarly, those joining CICs have determined that certain restrictions—such as a prohibition on parking mobile homes in driveways—increase property values.

These communities help to achieve efficient use of land as well. The costs of organizing and administering a private residential community are lower than in a public system (Nelson 2009). Transaction costs and rent-seeking through the political system are also reduced. Finally, because it is free from statutory and constitutional restraints, a private community has greater flexibility in the substance of its rules and operations, freeing it from adherence to public guidelines when entering into contracts with service providers and suppliers.

American courts have recognized these efficiency benefits when enforcing CIC arrange-

A quarter of the American population now lives in common interest communities.

limited property taxation in 1978, and similar measures in other states also spurred an increase in CICs, as cash-strapped local governments, under increased pressure to provide more services, were unwilling to absorb the infrastructure and service costs from new development. As a result, they tended to approve new developments only in CIC form, where the developer (and ultimately the owners) covered the costs.

Today, CIC owners are generally subject to a variety of constraints related to their private units, from limitations on the layout and design of buildings and the type of construction materials used, to restrictions on visible home decorations, ancillary structures, and landscaping. There are often controls on the owner’s behavior and use of the property, which is typically limited to residential occupancy. Noise, parking, and traffic rules may also be imposed, along with vehicle restrictions. In some cases, political signs, leafleting, and related activities are also prohibited.

In exchange for their association dues, owners have access to common facilities, such as roads and recreational areas, and to private services, such as security, trash collection, street cleaning, and snow plowing. The CIC is usually administered by a private residential government and various committees, elected by the owners



BOX 1

COMMON INTEREST COMMUNITY MODELS

CICs typically create a private government elected by the owners to administer and enforce contracts, and to promulgate rules to advance community interests. While the exact form of the arrangement may vary, the basic concepts are similar.

Homeowner Associations

Unit owners hold fee title to their individual properties, which are usually single-family or townhouse homes. The association holds title to common areas and grants the owners easement rights for their use. These can be created by common law or under statutes in some states. Homeowner associations make up more than half of community associations nationally.

Condominiums

Unit owners receive fee title to their units plus a percentage ownership in the common areas. The association administers the common areas but does not hold title to them. Condominiums may be vertical (high-rise) or horizontal (single-family or townhouse homes), and they are created exclusively pursuant to state statute. Condominiums represent 45 to 48 percent of community associations.

Cooperatives

A cooperative corporation owns the building, and the owners receive shares in the corporation and automatically renewable, long-term leases on their individual units. Unlike condominium and homeowner associations, the corporation can control transfer of leases and shares by cooperative owners. Only 3 to 4 percent of community associations are organized as cooperatives.

Middle-class condominiums gained market acceptance in the 1960s, as a result of early planned communities such as Reston, Virginia. Credit: BB_Image / iStock

ments and the owners' reliance on them. As one court noted, "It is a well-known fact that [covenants] enhance the value of the subdivision property and form an inducement for purchasers to buy lots within the subdivision" (*Gunnels v. No. Woodland Community Ass'n*, Tex. Ct. App, 17013 [1978]).

External Concerns: Secession from the General Community

Despite these benefits, various commentators have argued that the services and private facilities of CICs are available only to those who can afford them and facilitate the separation of the wealthy from the rest of society. The rest of a CIC's municipality is forced to do without, creating a permanent, two-tier system of housing. Critics also claim that privatization of infrastructure and services isolates CIC residents and reduces their stake in broad communal issues.

By this logic, CIC dwellers are less willing to engage with public government on civic matters and more likely to resist tax increases, given that the CIC rather than the municipal government provides many services. Where community associations are part of suburban developments, isolation from the urban core may be acute. These concerns often center on a fear of class and economic segregation. As former Secretary of Labor Robert Reich wrote in a *New York Times* article called "Secession of the Successful": *In many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services. . . . Condominiums and the omnipresent residential communities dun their members to undertake work that financially strapped local governments can no longer afford to do well* (Reich 1991).

FREEDOM OF CHOICE

This characterization of community associations, however, is at odds with the fundamental American values of freedom of contract and freedom of association. It is a shared value that people may spend their money for lawful

purposes as they wish and enter into contracts as they please. The law intrudes on freedom of contract only in rare instances when major policy considerations are at stake. Courts have recognized freedom of contract as an important consideration for upholding private servitude arrangements: *We start with the proposition that private persons, in the exercise of their constitutional right of freedom of contract, may impose whatever restrictions upon the use of land which they convey to another that they desire to impose* (Grubel v. McLaughlin, D. Va. [1968]).

CIC owners pay property taxes at the same rates as other citizens, even though they privately purchase services such as trash collection, street cleaning, and security with their community association dues. This amounts to double taxation.

CICs also reflect the American belief in freedom of association, exemplified in a long tradition of utopian communities and other belief-centered networks. Residents in modern CICs might share common interests, such as the homeowners living in golf or equestrian communities. Other residents may simply share a desire for neighborhood tranquility or character. In *Behind the Gates*, Setha Low suggests that CICs allow “middle-class families [to] imprint their residential landscapes with ‘niceness,’ reflecting their own aesthetic of orderliness, consistency, and control” (Low 2004). Whatever the reason, community associations are consistent with de Tocqueville’s observation about American interactions: *Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds—religious, moral, serious, futile, extensive or restricted, enormous or diminutive* (de Tocqueville 1835).

Moreover, the available evidence indicates that CIC residents are generally happy with their choice. In a 2014 survey conducted by Public Opinion Strategies for the Community Associa-

tions Institute, 64 percent of owners were positive about their overall experience, and 26 percent were neutral. While 86 percent of respondents indicated that they wanted either less or no additional governmental regulation, 70 percent maintained that association rules and restrictions protect and enhance property values.

THE ISSUE OF DOUBLE TAXATION

While the rise of CICs reflects a variety of factors, the constrained finances of municipalities following the property tax revolts in the 1970s were key. In fact, a different take on the “secession” narrative is that some owners in common interest communities believe that municipal government abandoned *them*.

CIC owners pay property taxes at the same rates as other citizens, even though they privately purchase services such as trash collection, street cleaning, and security with their community association dues. This amounts to double taxation, charging association owners for a service they are not receiving.

If a no-service policy were in effect before an owner purchased a unit in a CIC, theoretically the buyer could lower the offer price to reflect the lack of municipal services and the double-taxation-effect. The unit owner would be protected, and the developer would absorb the loss. But if a municipality reduces services but not taxes after the unit purchase, the owner suffers an uncompensated loss. This outcome would be bad policy in that it permits rent seeking, allowing the majority of citizens in the town to select one group of residents to bear an extra tax burden even though they do not create extra costs. This offends notions of both fairness and efficiency, and it’s antithetical to community building and civic trust.

It is especially important for legislatures to avoid the use of double taxation as a matter of policy, given that judicial challenges are unlikely to succeed. The few courts that have entertained attacks on double taxation have been unsympathetic to claims that it violates due process of law, offends the equal protection clause of the Constitution, or works a taking of property without compensation. While double taxation may

	MEAN			MEDIAN		
	All	Single Family	Condos/Coops	All	Single Family	Condos/Coops
2008	\$198,100	\$196,600	\$209,800	\$242,700	\$241,700	\$250,500
2009	\$172,500	\$172,100	\$175,600	\$216,900	\$217,000	\$216,300
2010	\$172,900	\$173,100	\$171,700	\$220,000	\$220,600	\$215,700
2011	\$166,100	\$166,200	\$165,100	\$214,000	\$214,300	\$211,300
2012	\$176,800	\$177,200	\$173,700	\$225,400	\$225,800	\$222,200
2013	\$197,100	\$197,400	\$194,900	\$245,000	\$245,700	\$244,300

FIGURE 2
EXISTING HOME PRICES 2008–2013

Source: Clifford J. Treese, Association Data, Inc., compiled from National Association of Realtors Data

be bad policy, it is not unconstitutional. The courts should not overturn such legislative decisions, because these are essentially political outcomes that the public should challenge at the ballot box.

THE QUESTION OF INEQUALITY

The “secession of the wealthy” argument appears to be based on the notion that only higher-income owners with higher-value homes live in common interest communities. The available data, however, do not clearly support this assumption. As Figure 2 indicates, prices for condominiums and cooperatives—half of the units in CICs nationally—are below those for all existing homes (including condominiums, cooperatives, and single-family homes inside and outside of community associations). While these estimates are not deeply segmented (for example, they do not break out single-family homes inside and outside CICs), they do show that the values of condominiums and cooperatives are consistent with those of homes generally.

Housing affordability and access are significant challenges in the United States, but community associations are not necessarily the cause of these deep-seated, complex problems. Employed before CICs became popular, exclusionary zoning imposed by local governments in the form of large lot requirements has prevented developers from building affordable housing. CICs have in fact been found to lower the costs

of home purchases. Multi-unit housing, such as condominiums and townhouses, is more affordable than single-family homes because it cuts the cost of land, infrastructure, and building (Ellickson & Been 2005). Affordable housing cooperatives permit restrictions on resale prices and owner income, thus ensuring that housing opportunities remain available for lower-income families. For these purposes, developers operating under city requirements or incentives often designate condominium units within a project as affordable units.

Affordable housing cooperatives permit restrictions on resale prices and owner income, thus ensuring that housing opportunities remain available for lower-income families.

It is therefore simplistic and counterproductive to see community associations as a battleground between rich and poor. Similarly, pejorative use of the term “gated” communities to describe those CICs with limited public access does not advance understanding. Indeed, a moderate-income cooperative with a front door locked for basic security reasons falls within the definition of a “gated” community.

GUIDING PRINCIPLES

In what ways should the “secession of the successful” critique affect our understanding, acceptance, and authorization of common interest communities? The issue is complex and does not lend itself to binary choices. Instead, it is a matter of accommodating competing interests according to the following principles:

- Acceptance of the CIC model has increased over time. These types of housing arrangements represent the free choice of many people, and the law enforces their contracts in most instances.
- CIC owners should relate to the municipal government and the CIC structure under what might be termed “augmented federalism.” Under this notion, residents have additional contractual duties to the CIC, but these obligations do not excuse them from duties to and participation in federal, state, and local governments. In return, legislators should base policy decisions affecting CIC owners on considerations of fairness, efficiency, and community building.

- Housing access and affordability require comprehensive solutions. These issues should be discussed and debated directly, and the political process should determine the course of action. Viewing these issues only as a CIC problem is unwarranted and will not bring effective results.

Internal Conflicts: Individual Owners vs. the Community

In his groundbreaking book *Privatopia: Homeowner Associations and the Rise of Private Residential Governments* (1996), Evan McKenzie warned that: *CICs feature a form of private government that takes an American preference for private home ownership and, too often, turns it into an ideology of hostile privatism. Preservation of property values is the highest social goal, to which other aspects of community life are subordinated. Rigid, intrusive, and often petty rule enforcement makes a caricature of . . . benign management, and the belief in rational planning is distorted into*

BOX 2

CONFLICTS MAKE GOOD COPY

While the following headlines fail to represent the myriad positive interactions between individual owners and associations, they do suggest some of the difficult interactions that can occur.

- “Marine’s Parents Sued Over Sign of Support in Their Bossier City [La.] Front Yard.” The 3 ft. x 6 ft. sign displayed a picture of their son in uniform, before deployment to Afghanistan, with text that read, “Our son defends our freedom” (Associated Press, July 25, 2011).
- “Bucks County Woman Fined by Homeowners’ Association For Colored Christmas Lights.” Association members had previously voted in favor of permitting white lights only (CBS Philly, December 2, 2011).
- “Dallas Man Suing Rabbi Neighbor Who Uses House as a Synagogue.” The plaintiff claimed that the use of the home for a 25-person congregation violated the residential restriction (KDFW Fox4 Online, February 4, 2014).
- “A Grandfather Is Doing Time For Ignoring A Judge’s Order in a Dispute Over Resodding His Yard.” The association won a judgment of \$795 against the owner who claimed that he could not afford to resod his browning lawn. When the owner failed to pay, the court jailed him for contempt (*St. Petersburg Times*, October 10, 2008).
- “Hilton Head Plantation Resident Disputes Gate Toll for Unpaid Fees.” An owner brought suit after an association imposed a \$10 entrance gate fee on homeowners delinquent on their annual association dues (*Island Packet*, August 29, 2014).

an emphasis on conformity for its own sake.

Conflicts between residents and CIC associations or boards often revolve around two general issues: the substance of the restrictions and the procedures for enforcement (see Box 2). As Figure 3 shows, disputes may focus on a range of topics, from landscaping restrictions to assessment collection. Indeed, 24 percent of CIC residents responding to the 2014 Public Opinion Strategies survey had experienced a significant personal issue or disagreement with their associations. Of this group, 52 percent were satisfied with the outcome and 36 percent were dissatisfied; in 12 percent of cases, the issue was still unresolved.

There are indeed certain risks that community associations can overstep with respect to the substance and enforcement of restrictions, but legislation and judicial supervision can address these substantive and procedural policy concerns.

FREEDOM OF CHOICE

As discussed earlier, individuals exercise their freedom of choice by purchasing homes in CICs and agreeing to be subject to their rules. Associa-

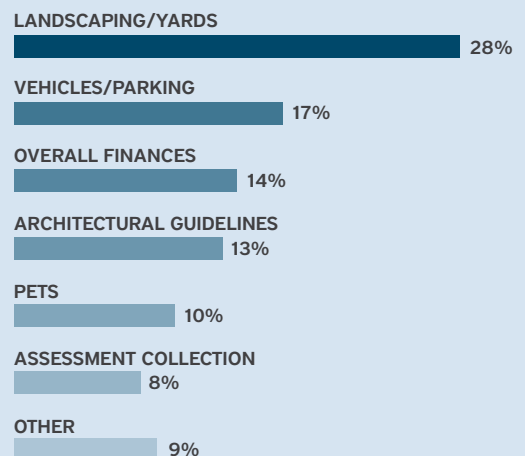
tion living may not be for everyone, but the expectation of people who choose the CIC life should generally be respected and not be frustrated by someone who subsequently seeks to violate the compact. The courts generally reflect this view, as suggested by this 1981 ruling: *[The original] restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing and accepting the restrictions to be imposed. . . . [A] use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration . . . since such restrictions would be in a potential condition of continuous flux (Hidden Harbour Estates v. Basso, Fla. Ct. App. [1981]).*

There are several scenarios, though, where homeowners may have no freedom of choice. First, it is possible that the only new housing available to buyers would be in CICs—i.e., developers are no longer building new homes outside of associations. Indeed, a recent report



The owner of this home in St. Petersburg, Florida, ended up in jail for refusal to resod his browning lawn or pay the resulting \$795 fine from his homeowner association. Credit: © Lance Aram Rothstein/Tampa Bay Times/ZUMA Press

FIGURE 3
SOURCES OF DISAGREEMENTS BETWEEN OWNERS AND ASSOCIATIONS



Source: Public Opinion Strategies 2014

found that in 2003, 80 percent of all homes being built at that time were in associations (Foundation for Community Association Research 2014). In addition, municipal government may require developers to create associations as a condition for subdivision approval. (Recent legislation in Arizona prohibiting this practice indicates that it still occurs.) Finally, some courts have suggested that while rules in place at the time of purchase should be enforced, a rule subsequently enacted

ities) from one owner to the rest of the community. They should not, however, enforce restrictions that limit the nature or status of the occupants or the behavior within a unit that does not create externalities. This approach is based on the theory that the primary purpose of CIC regimes is to enhance economic value and encourage efficient exchanges. Thus, if the owner creates no externalities, the courts should not enforce bans on the particular behavior. Moreover, some values of personal autonomy are too important and trump the usual rules of contract. We do not, for example, permit contracts of indentured servitude or the sale of human organs.

By this standard, limiting noise and banning smoking (because of seepage of odors) in multi-family units would be legitimate, but restrictions based on the marital status of residents would not. Some situations are trickier—for example, restrictions on pets. Under the suggested guidelines, it would usually be legitimate to bar pets because of the potential noise and the reluctance of some residents to share common areas with them. In the case of service animals, however, the unit owner’s health needs may trump community concerns.

First Amendment-type issues present special challenges. Free expression—such as political or issue-related signage, leafleting, demonstrations, or other manifestations—can cause spillovers that may include noise, aesthetic interference, and disruption of the community’s general ambience. At the same time, however, free speech is fundamental to our republican form of government, arguably whether it is addressed to the larger public government or the private government. In expression cases, courts might apply the longstanding doctrine that prohibits covenants that violate public policy, rejecting total bans on speech in favor of reasonable restrictions on time, place, and manner. This would allow expression but limit, if not eliminate, spillover on the community.

Religious freedom is another fundamental American value. Restrictions on the placement of a mezuzah on doorposts and the display of crèches, statues of saints, and Christmas lights limit free exercise of religion. While it would open

Association restrictions raise concerns when they threaten the personal autonomy and fundamental individual rights of owners.

by the association or board under a reserved power should not be enforced if an owner can show that it is “unreasonable.” Other courts disagree: *Homeowner should not be heard to complain when, as anticipated by the recorded declaration of covenants, the homeowners’ association amends the declaration. When a purchaser buys into such a community, the purchaser buys not only subject to the express covenants in the declaration, but also subject to the amendment provisions. . . . And, of course, a potential homeowner concerned about community association governance has the option to purchase a home not subject to association governance. . . . For this reason, we decline to subject the amendments . . . to the “reasonableness” test (Hughes v. New Life Development Corp., Tenn. Sup. Ct. [2012]).*

Guidelines for Protecting Personal Autonomy


Association restrictions raise concerns when they threaten the personal autonomy and fundamental individual rights of owners. Constraints of this type might include prohibitions of political signs or messaging, and restriction of occupancy to “traditional” families.

Courts should enforce restrictions if they limit spillovers (also known as fallout or external-

a Pandora's box to engage in balancing the religious importance of colored versus white Christmas lights against CIC standards, it would nevertheless be appropriate for the courts to impose a general standard of reasonable accommodation on CIC regulations that affect religious practices.

Finally, in the development and enforcement of association rules, CIC property owners have a right to expect certain behavior from associations and boards. This expectation traces from the obligation of good faith and fair dealing that is incumbent on all parties to a contract. Thus, an owner should have a right to fair procedures, including notice and an opportunity to be heard; to be treated equally to other similarly situated owners; and to be free from bias, personal animus, and bad-faith decision making by the board and its members.

Conclusion

Common interest communities are a large part of the American residential landscape, currently providing homes for a quarter of the U.S. population. While CICs bring great economic advantages to residents and society in general, these types of housing arrangements do require nuanced interactions between the community association and the municipal government, and association rules can impinge on the personal autonomy of members. However, strategies are available to mitigate if not overcome these problems. Indeed, these approaches can make ownership of a home in a CIC less of an illusion and more of a reality. 

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